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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1997

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OUIDA SUE PARKER,
*Petitioner,*

v.

METROPOLITAN LIFE INSURANCE COMPANY,
SCHERING-PLOUGH CORPORATION and
SCHERING-PLOUGH HEALTH CARE PRODUCTS, INC.,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF IN OPPOSITION OF RESPONDENT METROPOLITAN LIFE INSURANCE COMPANY

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## BRIEF IN OPPOSITION OF RESPONDENT METROPOLITAN LIFE INSURANCE COMPANY

---

Respondent Metropolitan Life Insurance Company ("MetLife") respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the *en banc* decision of the United States Court of Appeals for the Sixth Circuit in *Parker v. Metropolitan Life Ins. Co., et al.*

## STATEMENT OF THE CASE

Petitioner was an employee of Respondent Schering-Plough Corporation ("Schering") and a participant in Schering's Long Term Disability ("LTD") Plan ("Plan"). MetLife issued a policy of group insurance to Schering to provide LTD benefits under the Plan to eligible participants. Schering was the Plan Administrator of its employee welfare benefit plan. MetLife was the Plan's claims

administrator. On October 29, 1990 Petitioner applied for LTD benefits, claiming to be totally disabled due to a primary diagnosis of "major depression" and a secondary diagnosis of "generalized anxiety disorder." Her claim was approved and she received monthly LTD benefits from April 29, 1991 to April 28, 1993. LTD benefits were terminated under the Plan's provision limiting benefits to two years for total disability which "in any way results from, or is caused or contributed to by, a mental or nervous disorder." The Plan provides LTD benefits for disabilities resulting from physical disorders up to age 65.

Petitioner filed lawsuits (subsequently consolidated) against Schering and MetLife alleging unlawful discrimination under Title I and III of the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, because of the Plan's limitation of benefits provision for disabilities due to mental/nervous disorders. Upon motions by Respondents, the United States District Court for Western District of Tennessee dismissed Petitioner's claims under Titles I and III of the ADA.[1] Petitioner's Appendix ("App."), pp. 80-84.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit. A three-judge panel affirmed the district court's dismissal of Petitioner's Title I claim, holding that, because she was unable to work, she was not a "qualified individual with a disability."[2] App., pp. 48-52. However, the panel reversed the district court's dismissal of the Title III claim. App., pp. 54-65.

Following a rehearing *en banc,* the Sixth Circuit reversed the appellate panel's Title III decision and affirmed the district court's decision.[3] The Sixth Circuit held that Title III did not prohibit an employer from providing to

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[1] The district court decision is reported at 875 F. Supp. 1321 (W.D. Tenn. 1995).

[2] The panel decision is reported at 99 F.3d 181 (6th Cir. 1996).

[3] The *en banc* Sixth Circuit decision is reported at 121 F.3d 1006 (6th Cir. 1997).

its employees a disability benefits plan funded by a group insurance policy which contains a provision for longer duration of benefits for those who become disabled due to physical illness than those who become disabled due to mental illness. The Sixth Circuit reasoned that Title III did not apply because a disability benefit plan offered by an employer is not a good offered by a place of public accommodation. "There is thus no nexus between the disparity in benefits [under the Plan] and the services which MetLife offers to the public from its insurance office." App., pp. 10-12. The *en banc* court noted that Petitioner did not and could not access a group disability policy from a MetLife insurance office; the group insurance policy that MetLife provided to Schering was not available to the general public. App., pp. 12-13. The Sixth Circuit further concluded that Title III does not regulate the contents of goods and services offered by public accommodations, but rather only regulates access to those goods and services. App., p. 13-14. The *en banc* court also held that the disparity in benefits provided by the Plan and policy is not prohibited by the ADA, which only prohibits discrimination between the disabled and non-disabled. Because all Schering employees, whether disabled or not, received equal access to the benefits offered under the LTD Plan, no claim of discrimination under Title III can be stated. App., pp. 23-32. Finally, the Sixth Circuit held that Title I, not Title III, governs alleged discrimination in employment practices. App., pp. 20-23.

## REASONS WHY THE PETITION SHOULD BE DENIED

None of the questions Petitioner would have this Court review are in fact appropriate for review under Rule 10 of the Supreme Court Rules. Respondent MetLife will show:

- The question concerning Title III of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. (Petition For a Writ of Certiorari

("Petition") at i, item 2), is simply not presented here. Petitioner mischaracterizes the Sixth Circuit's holding that a group disability benefit plan is not a good offered by a place of public accommodation. Petitioner was not denied access—either physically or in any other way—to any MetLife product. This case, therefore, presents no occasion for this Court to consider whether Title III's regulation of access to places of public accommodation is limited to physical access. Petitioner's request that this Court review the question of whether Title III regulates the content of goods and services offered by places of public accommodaiton is also without merit, since there is no circuit conflict with respect to *Parker's* holding on this issue.

- The question concerning Title I of the ADA (Petition at i, item 1)—whether a totally disabled individual is a "qualified individual with a disability" —has been answered correctly and consistently by the Sixth Circuit in *Parker* and all other circuits which have addressed the issue. There is thus no circuit conflict and this Court can wait to see if one develops before considering this issue. Moreover, since this Court's holding in *Robinson v. Shell Oil Co.* is inapplicable to the Sixth Circuit's Title I holding, there is no reason for the Court to grant discretionary review.

- The question concerning Section 501(c), 42 U.S.C. § 12201(c), of the ADA (Petition at i, item 3) is also not presented by the *Parker* case. Because the Sixth Circuit held that no violation of Titles I and III had occurred, it did not need to address the meaning of the "safe harbor" provision. Therefore, review is not appropriate.

**I. The Holding Of The Sixth Circuit That Title III Of The ADA Does Not Prohibit An Employer From Providing To Its Employees A Disability Benefits Plan Containing Different Levels Of Benefits For Disabilities Due To Mental Illnesses And Physical Illnesses Is Consistent With Statutory Language And Not In Conflict With The Holding Of Any Circuit Court; Therefore, There Is No Compelling Reason For Granting Discretionary Review Under Rule 10.**

**A. *The Question Petitioner Tenders Concerning Whether Title III Pertains Only to Physical Access to Structures Is Not Presented by This Case and Rests on a Mischaracterization of the Sixth Circuit's Holding; Therefore, the Petition Should Be Denied.***

Petitioner, by mischaracterizing the holding of the Sixth Circuit in Parker, has failed to demonstrate a "compelling reason" why this Court should grant discretionary review on a writ of certiorari under Rule 10 of the Supreme Court Rules. Petitioner claims that the crux of the *Parker* court's holding is that, because Petitioner did not physically access her policy from a MetLife insurance office, and since Title III covers only physical places of public accommodation, Petitioner has no claim under Title III. Petition, pp. 9-11. This holding, Petitioner claims, conflicts with *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994), which held that the application of Title III is not limited to physical structures.

What the *Parker* court actually held, however, was that a disability benefit plan provided by a private employer and funded by a group insurance policy not available to the general public is not a good offered by a place of public accommodation. As the Sixth Circuit explained:

> The public cannot enter the office of MetLife or Schering-Plough and obtain the long term disability policy that plaintiff obtained. Parker did not access her policy through MetLife's insurance office. Rather

> she obtained her benefits through her employer. There is, thus, no nexus between the disparity in benefits and the services which MetLife offers to the public from its insurance office.

App., pp. 11-12. In other words, in the context of providing a group insurance policy to Schering to provide disability benefits to its employees, MetLife is a wholesaler engaged in a business-to-business transaction; the product it sold to Schering cannot be accessed by any individual member of the general public at any MetLife "insurance office."

The court noted that its conclusion is supported by the Department of Justice ("DOJ"), the agency charged with enforcement of Title III. The DOJ explained that wholesale establishments which sell goods to other businesses and not to individuals are not considered places of public accommodation.

> For example, a company that grows food produce and supplies its crops exclusively to food processing corporations on a wholesale basis does not become a public accommodation because of these transactions. If this company operates a road side stand where its crops are sold to the public, the road side stand would be a sales establishment covered by the ADA. . . . Of course, a company that operates a place of public accommodation is subject to [Title III] only in the operation of that place of public accommodation. In the example given above, the wholesale produce company that operates a road side stand would be a public accommodation only for the purpose of operation of that stand. The company would be prohibited from discriminating on the basis of disability in the operation of the road side stand, and it would be required to remove barriers to physical access . . . .

28 C.F.R. pt. 36, app. B at 614 (1997); App., pp. 12-13. Thus, the Sixth Circuit correctly concluded: "[T]he offering of disability policies on a discounted basis solely to

a business is not a service or good offered by a place of public accommodation." App., p. 13.

In *Carparts* an employee challenged a lifetime benefit limitation for AIDS-related treatments in a self-funded medical benefit plan. The plan had been provided to the employee's employer through an employer association and its administering trust. The First Circuit held that Title III does not require that places of public accommodation have physical structures for persons to enter. The *Carparts* court was concerned about limiting the means of access to a place of public accommodation. The First Circuit observed: "It would be irrational to conclude that persons who enter an office to purchase a service are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not." 37 F.3d at 19. However, Petitioner's perceived conflict (*see* Petition, pp. 10-11) between *Parker* and *Carparts* over the method of access—whether by physical entry, telephone, mail, etc.—to a place of public accommodation is illusory. The Sixth Circuit specifically commented: "We have expressed no opinion as to whether a plaintiff must physically enter a public accommodation to bring suit under Title III as opposed to merely accessing, by some other means, a service or good provided by public accommodation." App., p. 12, fn. 3. The point is that neither Petitioner nor any member of the general public could access *by any means* the group insurance policy MetLife sold to Schering.

Moreover, *Carparts did not hold* that an organization providing a health benefit plan to the employees of its members is a public accommodation; rather the First Circuit remanded the case to the district court to "allow plaintiffs the opportunity to adduce further evidence supporting their view that the defendants are places of 'public accommodation' within the meaning of Title III of the ADA." *See Carparts,* 37 F.3d at 19. Where the courts

in *Parker* and *Carparts* differed was over whether a "place of public accommodation" must be a physical place. *Carparts* found that such places are not limited to actual physical physical structures (37 F.3d at 19); *Parker* (correctly in Respondent's view) found that the statute requires a physical place (App., pp. 10-11; 17-19). But that conflict is not determinative with respect to the core holding of *Parker* that an employer-provided disability benefit plan is not a good offered by a place of public accommodation. Moreover, the *Carparts* court was careful to cautiously limit its holding: "Beyond our threshold determination, we must tread with care . . . We think that at this stage it is unwise to go beyond the *possibility* that the plaintiff may be able to develop some kind of claim under Title III even though this may be a less promising vehicle in the present case than Title I." 37 F.3d at 19, 20 (emphasis in original).

Additionally, this is not a proper case to consider whether a "place of public accommodation" requires an actual physical structure because the Sixth Circuit also held that, in any case, no disability-based discrimination had occurred since Petitioner had equal access to the same disability benefit plan as all other Schering employees, disabled or not. *See* App., pp. 23-32.

Thus, because of Petitioner's mischaracterization of the *Parker* holding, there is no compelling reason under Rule 10 why this Court should grant discretionary review.

### B. *The Sixth Circuit's Holding That Title III Only Covers Access to Goods and Services Offered by a Place of Public Accommodation but Not the Content of Those Goods and Services Is Consistent With Statutory Language and Congressional Intent, and Is Not in Conflict With the Decision of Any Circuit Court; Therefore Review Should Not Be Granted.*

There is no compelling reason for this Court to grant review with respect to the *Parker* court's holding that

Title III is intended to provide people with disabilities with equal *access* to goods and services offered by places of public accommodation, but not intended to regulate the substantive *content* of such goods and services. App., pp. 13-15. Petitioner's attempt to manufacture a conflict between *Parker* and *Carparts* on this holding fails. Although claiming the existence of a conflict, Petitioner is forced to admit that *Carparts "did not reach this issue. . . ."* Petition, p. 12 (emphasis added). As the *Carparts* court itself observed: "In drafting Title III, Congress intended that people with disabilities have *equal access* to the array of goods and services offered by private establishments and made available to those who do not have disabilities. S. Rep. No. 116, 101st Cong., 1st Sess. at 58 (1989)." 37 F.3d at 19 (emphasis added).

Title III's legislative history makes abundantly clear that Congress did not intend to regulate the *content and design* of goods and services (such as insurance policies), but merely *access* to them. Congressional reports revealed the rationale behind Title III's prohibition of discrimination in access to places of public accommodation:

> Based on testimony presented at the hearings and recent national surveys and reports, it is clear that an overwhelming majority of individuals with disabilities lead isolated lives and do not frequent places of public accommodation. . . Several witnesses addressed the obvious question "Why don't people with disabilities frequent places of public accommodation and stores as often as other Americans"? Three major reasons were given by witnesses. The first reason is that people with disabilities do not feel that they are welcome and can participate safely in such places. The second reason is fear and self-consciousness about their disability stemming from degrading experiences they or their friends with disabilities have experienced. The third reason is architectural, communication, and transportation barriers.

H.R. Rep. 485, 101st Cong., 2nd Sess. at 34-35 (1990); S. Rep. No. 116, 101st Cong., 1st Sess. at 11 (1989).

All of the issues mentioned above deal with access; none concerns the substantive content or design of the goods or services available at a place of public accommodation. The clear purpose of Title III was to eliminate barriers to access for disabled people in obtaining goods and services from places of public accommodation, not to require that all goods and services be redesigned for use by every category of disabled persons.[4] This is further demonstrated by the regulations promulgated under Title III which instruct that:

> This part does not require a public accommodation to alter its inventory to include accessible or special goods that are designed for, or facilitated by, individuals with disabilities.

28 C.F.R. § 36.307(a). As the *Parker* court points out (App., pp. 13-14), the DOJ has further explained:

> The purpose of the ADA's public accommodations requirements is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided. In other words, a bookstore, for example, must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Braille or large print books. Similarly, a video store must make its facilities and rental operations accessible, but is not required to stock close-captioned video tapes.

28 C.F.R. pt. 36, App. B at 640 (1997).

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[4] The First Circuit in *Carparts similarly* observed:

> One who simply reads the Committee Report describing the operaiton of Title III could easily come away with the impression that it is primarily concerned with access in the sense of either physical access to a place of public accommodation or something analogous, such as access provided through telephone lines, messengers or some other medium.

37 F.3d at 19-20.

Thus, it is clear that the Congressional purpose embodied in Title III was to offer disabled persons equal access to goods and services through the removal of barriers to such access and prohibition of refusals to deal with disabled individuals, but does not encompass or envision regulation of the content and design of the goods and services offered by places of public accommodation. Moreover, because no circuit court has disagreed with the Sixth Circuit's holding in *Parker* in this regard, there is no conflict between the circuits warranting a grant of discretionary review.

An examination of the district court cases upon which Petitioner relies to support her request for review (Petition, p. 14) reveals that the majority are *access* cases involving denials of personal insurance policies to disabled persons by retail insurance offices.[5] They are readily distinguishable from *Parker* in that they do not involve group policies (which are unavailable to the general public) or employee benefit plans; nor are they concerned with the content of insurance policies. Thus, these district court cases offer no support for review of *Parker* by this Court. In any event, they are district court cases; no circuit conflict is presented.

Remarkably, Petitioner argues that the exemption from coverage given to insurers and benefit plans under Section 501(c), 42 U.S.C. § 12201(c) (the "safe harbor" provision),[6] supports her contention that the content and

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[5] *See, e.g., Doukas v. Metropolitan Life Ins. Co.*, 950 F. Supp. 422 (D.N. H. 1996) (Title III claim stated with respect to denial of application for personal mortgage disability insurance policy from retail insurance agency); *Kotev v. First Colony Life Ins. Co.*, 927 F. Supp. 1316 (C.D. Cal. 1996) (denial of application for individual life insurance policy); *Baker v. Hartford Life Ins. Co.*, 1995 U.S. Dist. LEXIS 14103 (N.D. Ill. 1995) (same); *Cloutier v. Prudential Ins. Co. of Am.*, 964 F. Supp. 299 (N.D. Cal. 1997) (same).

[6] Section 501(c) provides:

> Subchapters I through III of this chapter and Title IV of this Act shall not be construed to prohibit or restrict—

design of insurance products and employee benefit plans are regulated by the ADA. *See* Petition, pp. 12-14. This mysterious sleight-of-hand by which an exemption from statutory coverage is transformed into a broad expansion of coverage is contrary to the clear Congressional intent not to disrupt "the way the insurance industry does business in accordance with State laws and regulations. . . ." S. Rep. No. 116, 101st Cong., 1st Sess. at 84 (1989).

Indeed, far from evidencing an intent to regulate the content of insurance products, the ADA does the opposite. Its "safe harbor" provision states that the statute is *not* intended to supersede State insurance laws, which, pursuant to the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, occupy the field in this area. Had Congress intended that the ADA regulate something as significant as the content of insurance policies, it would undoubtedly have done so explicitly. As Judge Brieant declared in *Leonard F. v. Israel Discount Bank*, 967 F. Supp. 802, 805 (S.D. N.Y. 1997).[7]:

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> (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks or administering such risks that are based on or not inconsistent with State law; or
>
> (2) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (3) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.
>
> Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapters I and III.

42 U.S.C. § 12201(c).

[7] In *Leonard F.* the district court dismissed a Title III claim against MetLife with respect to its issuance of a group disability

> Congress meant to protect providers [of] insurance and their practice of providing different levels of benefits for individuals with physical and mental conditions (as a risk classification practice). The ADA does not, nor was it ever intended to regulate the business of insurance, and for that reason it includes an explicit "Safe Harbor" provision shielding traditional insurance risk classification practices from regulation under the ADA.

Neither *Carparts* nor any other circuit court has held that the content and design of insurance policies and employee benefit plans are regulated by Title III of the ADA. Indeed, two circuits have reached the conclusion that the term " subterfuge" in Section 501(c) does not expand the scope of the ADA to regulate the substantive terms of benefit plans and insurance policies. *See Modderno v. King*, 82 F.3d 1059, 1065 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 772 (1997); *Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674, 678-79 (8th Cir. 1996). Thus, in the absence of a circuit conflict this issue is not ripe for review by this Court and the Petition should be denied.[8]

Likewise, the Sixth Circuit's refusal to defer to the DOJ's view in its non-authoritative Technical Assistance Manual that insurance policy contents are regulated by

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policy to an employer to fund an employee benefit plan which contained a two-year limitation of benefits provision for disabilities caused by mental illnesses.

[8] The Court should be aware that there is another case involving the same ADA Title I and Title III issues as *Parker*—and indeed the same defendants—now before the Third Circuit: *Ford v. Schering-Plough Corp., et al.*, no. 96-5674, *on appeal from* no. 96-1991 (D. N.J. Sept. 12, 1996). The district court in *Ford* dismissed plaintiff's ADA claims for the same reasons as the *Parker* court. Briefing in *Ford* has been completed; oral argument has been set for January 26, 1998.

the ADA[9] does not present a compelling reason for granting review. Contrary to Petitioner's contention (*see* Petition, pp. 15-18), the Manual's statement that Title III regulates the "terms and conditions of insurance contracts" is clearly inconsistent with the DOJ's own regulation that Title III does not require a public accommodation to "alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities." 28 C.F.R. § 36.307(a). Under the Manual's interpretation, insurance products are the *only* goods and services whose content and design are so regulated by Title III, despite the safe harbor provisions expressly exempting insurance practices from such regulation! Thus, the Sixth Circuit properly declared: "As this interpretation is inconsistent with [the DOJ's] regulations and the statutory text of Tile IV, we decline to adopt it." App., pp 14-15 fn. 5. When an agency interpretation is so clearly at odds with the plain meaning of the statute, it need not be given deference. *See Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171; *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). Therefore, there is no compelling reason for this Court to grant discretionary review because the Sixth Circuit properly declined to follow an unauthoritative and inconsistent agency interpretation.

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[9] In its Technical Assistance Manual, § III-3.11000, *reprinted in* Americans With Disabilities Act Manual (BNA) at 90:917, the DOJ stated:

> Insurance offices are places of public accommodation and, as such, may not discriminate on the basis of disability in the sale of insurance contracts or in the terms or conditions of the insurance contracts they offer. Because of the nature of the insurance business, however, consideration of disability in the sale of insurance contracts does not always constitute "discrimination." An insurer or other public accommodation may underwrite, classify or administer risks that are based on or not inconsistent with State law, provided that such practices are not used to evade the purposes of the ADA.

### C. *The Sixth Circuit's Holding That the ADA Only Prohibits Discrimination Between the Disabled and Non-Disabled, and Petitioner Had Equal Access to the Same Benefits Plan as All Schering Employees Whether Disabled or Not, Is Consistent With Statutory Language and Decisional Law; Therefore Review Is Not Warranted.*

Petitioner further claims that the Sixth Circuit erred in its holding, which provides an additional basis for affirming the dismissal of her Title III claim, that the ADA only prohibits discrimination between the disabled and the non-disabled. Petition, pp. 28-29. Petitioner's bare assertion of error is not a compelling reason for this Court to grant review. Petitioner does not cite *any case*, much less a circuit court case, which supports her position. Indeed, the decisions of this Court and other courts are consistent in holding that the ADA (and its predecessor the Rehabilitation Act) does not mandate equality of benefits between individuals with different disabilities. Because Petitioner was afforded equal access to the same benefit plan as all other Schering employees, whether disabled or non-disabled, there is simply no basis for a claim of discrimination.

The Sixth Circuit in *Parker* held:

> The disparity in benefits provided in the policy at issue is also not prohibited by the ADA because the ADA does not mandate equality between individuals with different disabilities. Rather, the ADA prohibits discrimination between the disabled and the non-disabled; specifically, the ADA mandates that the owners, lessors, and operators of public accommodations provide equal access to the disabled and non-disabled. Because all employees at Schering-Plough, whether disabled or not, received the same access to the long-term disability plan, neither the defendants nor the plan discriminated between the disabled and the able-bodied.

App., p. 23. The Sixth Circuit relied, in part, upon this Court's holding in *Traynor v. Turnage,* 485 U.S. 535

(1988), that the Veteran's Administration did not violate the Rehabilitation Act of 1973, 29 U.S.C. § 794,[10] by denying extensions of educational benefits to veterans whose disabilities were attributed to their "willful misconduct." This Court explained: "There is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons." 485 U.S. at 549. *See also Alexander v. Choate*, 469 U.S. 287 (1985) (Tennessee's reduction of the number of inpatient days for which Medicaid would pay, which had disproportionate effect on disabled individuals because of their greater medical needs, did not violate the Rehabilitation Act, which "does not . . . guarantee the handicapped equal results from the provision of state Medicaid . . .").

Applying *Traynor* and *Alexander*, the D.C. Circuit recently held that a health benefit plan for federal employees did not violate the Rehabilitation Act by providing different levels of coverage for mental and physical illnesses. *Modderno*, 82 F.3d 1059 (D.C. Cir. 1996). The D.C. Circuit concluded that such disparity was not the "sort of harm which the Rehabilitation Act was intended to address." 82 F.3d at 1061. In a concurring opinion, Judge D. Ginsburg explained: "As long as the Foreign Service Benefit Plan offers the same coverage to all insureds, regardless of the disability, it cannot be said to discriminate on the basis of disability." 82 F.2d at 1066.

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[10] The Rehabilitation Act, as amended, provides that:

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a). The ADA provides that its provisions be interpreted in a way that "prevents imposition of inconsistent or conflicting standards for the same requirements under this title and the Rehabilitation Act of 1973." 42 U.S.C. § 12117(b).

Similarly, the Seventh Circuit in *Equal Employment Opportunity Commission v. CNA Ins. Co.*, 96 F.3d 1039 (7th Cir. 1996), held that a two-year limitation of benefits provision for mental illness in a long term disability plan (the same provision at issue in *Parker*) did not violate the ADA. The Seventh Circuit stated:

> [The employer] did not charge higher prices to disabled people, on the theory that they might require more in benefits. Nor did it vary the terms of its plan depending on whether or not the employee was disabled. All employees—the perfectly healthy, the physically disabled, and the mentally disabled—had a plan that promised them long term benefits from the onset of disability until age 65 if their problem was physical, and long term benefits for two years if the problem was mental or nervous. This may or may not be an enlightened way to do things, but it was not discriminatory in the usual sense of the term.

96 F.3d at 1044 (citations omitted).

The Eighth Circuit reached a similar conclusion in *Krauel*, 95 F.3d 674 (8th Cir. 1996), finding that an employee benelt plan which excluded medical coverage for treatment of infertility that was equally applied to all participants did not violate the ADA. Citing the EEOC's "Interim Enforcement Guidance on Application of the ADA to Health Insurance," the court held that "[i]nsurance distinctions that apply equally to all insured employees, that is to individuals with disabilities and to those who are not disabled, do not discriminate on the basis of disability." 95 F.3d at 678.

The ADA's legislative history provides further support that a benefit plan may limit the amount and type of coverage provided, as long as individuals with disabilities receive the same *access* to whatever coverage is provided to individuals without disabilities. Thus, the House Judiciary Committte report stated: "[W]hile it is permissible for an employer to offer insurance policies that limit

coverage for certain procedures or treatments, coverage cannot be denied entirely to a person with disability." H.R. Rep. No. 485, 101st Cong 2d Sess., pt. 3 at 71 (1990). The House Labor Committee report explained: "All people with disabilities must have equal access to the health insurance coverage that is provided by the employer to all employees." H.R. Rep. No. 485, 101st Cong., 2nd Sess., pt. 2 at 59 (1990). Since Petitioner received access to the same package of disability benefits offered to all other Schering Plan participants, disabled or non-disabled, the *Parker* court correctly concluded that no ADA violation had occurred. Because all circuit courts that have addressed this issue have reached the same conclusion, there is no reason for this Court to grant discretionary review.

Furthermore, the recent passage of the Mental Health Parity Act of 1996 ("MHPA"), 29 U.S.C. § 1185(a), demonstrates that partity in benefits for mental and physical illnesses is not mandated by the ADA. The MHPA requires parity for mental and physical conditions in annual and lifetime benefits limits in health insurance plans. (The MHPA expressly does not apply to disability benefit plans or policies.) As the *Parker* court observed, the passage of MHPA demonstrates that "Congress believed the ADA neither governs the content of insurance policies nor requires parity between physical and mental illnesses; thus, passage of a law requiring such parity was required if Congress desired insurance carriers to cease including disparate mental and physical health benefits in insurance policies." App., p. 29. Significantly, Petitioner does not discuss this rationale for the *Parker* court's holding that the ADA does not prohibit a disparity in benefits between mental and physical conditions in long-term disability benefit plans. Thus, there is no reason for this Court to grant Petitioner's request for review.

### D. *The Sixth Circuit's Holding That Allegations of Discrimination in Employment Practices Are Governed Exclusively by Title I Is Unchallenged by Petitioner; Therefore Review Is Not Appropriate.*

Another basis for the Sixth Circuit's decision in *Parker* is that Title III does not govern allegations of discrimination in employment practices. *See* App., pp. 20-23. Legislative history makes clear that any claim of discrimination in employee benefits is covered by Title I of the ADA. *See, e.g.*, S. Rep. No. 116, 101st Cong., 1st Sess. at 58 (1989) ("Title III is not intended to govern any terms or conditions of employment by providers of public accommodations . . . employment practices are governed by Title I of this legislation"). *See also Motzkin v. Trustees of Boston University*, 938 F. Supp. 983, 996 (D. Mass. 1996) ("The legislative intent is so clear from the language of Titles I and III that one need not go beyond that language to conclude that employment discrimination is the exclusive province of Title I.") It would clearly be incongruous to permit an employee challenging the design of her employer's benefit plan to bring a Title III claim against the insurer underwriting the benefits, yet insulate the employer which sponsored and maintains the plan from a Title III claim. In any case, Petitioner has not addressed this holding; therefore there is no reason for this Court to grant review.

## II. There Is No Compelling Reason To Grant Discretionary Review Of The Sixth Circuit's Affirmance Of The Dismissal Of Petitioner's Title I Claim Because She Is Not A "Qualified Individual With A Disability" Since All Circuit Courts Addressing The Issue Have Reached The Identical Conclusion And This Court's Holding In *Robinson v. Shell Oil Co.* Is Not Applicable.

### A. *Because There Is No Circuit Conflict With Respect to* Parker's *Holding That a Totally Disabled Individual Is Not a "Qualified Individual With a Disability," This Issue Is Not Worthy of Review.*

There is no compelling reason for this Court to grant discretionary review of the Sixth Circuit's affirmance of the

dismissal of Petitioner's Title I claim. All three decisions in *Parker*—the district court's, the appellate panel's and the *en banc* court's—uniformly hold that, under the clear language of the statute, Petitioner cannot state a claim under Title I. Furthermore, all U.S. courts of appeals which have addressed the issue have reached the identical conclusion that a totally disabled individual is not a "qualified individual with disability" and therefore lacks standing to sue under Title I of the ADA. Therefore, in the absence of any conflict or inconsistency between *Parker*'s Title I holding and the plain meaning of the statute and the decisions of this Court or any circuit court, Petitioner's request for review should be denied.

Title I of the ADA prohibits discrimination in employment "against a qualified individual with a disability because of that disability . . . ." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, *can perform the essential functions of the employment position* that such individual holds or desires." 42 U.S.C. § 12111(8) (emphasis added). As numerous circuit courts have held, the meaning of "qualified individual with a disability is clear: the protections of Title I are extended only to individuals with disabilities who can work at their jobs. Individuals who are unable to work are not protected. *See, e.g., McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 618 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997) (" a person unable to work is not intended to be, and is not, covered by [Title I of] the ADA"); *Tyndall v. National Educ. Centers*, 31 F.3d 209, 212 (4th Cir. 1994) ("under the ADA, only persons who are 'qualified' for the job in question may state a claim for discrimination"); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996) (totally disabled person could not bring ADA Title I claim); *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995) (employee who could not perform essential functions of the job with accom-

modation was not "qualified" within meaning of the ADA).

The district court in *Parker* similarly stated: "[T]he plain language of the Act clearly indicates that the ADA was designed to afford relief only to those individuals with disabilities who can perform the essential functions of the job they hold or seek." App., p. 79. Therefore, because Petitioner was admittedly totally disabled from performing any job when the alleged discrimination occurred (i.e., when her disability benefits were terminated), the district court correctly held that she was not a "qualified individual with a disability" and could not state a Title I claim. App., pp. 76-81. The appellate panel of the Sixth Circuit affirmed the district court's dismissal of the Title I claim, rejecting Petitioner's and the EEOC's argument that Petitioner qualified for the "employment position" of "benfits recipient" as "creative thinking" and "a convoluted construction of the statutory language, which coflicts with the plain meaning of the words." App., p. 51. The *en banc* court reaffirmed the district court's dismissal of the Title I claim without discussion, noting that Petitioner "did not seek rehearing on the disposition of her Title I claim." App., p. 5, fn. 2.

Petitioner now asserts that the Title I holding is ripe for review by this Court. Contrary to Petitioner's assertion that *Parker*'s Title I holding is a case of "first impression" (Petition, p. 20), however, other circuit courts which have addressed the Title I standing issue in cases involving claims of discrimination in provision of fringe benefits have uniformly applied the clear statutory language in precisely the same way as did the Sixth Circuit.

For example, in *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039 (7th Cir. 1996), the Seventh Circuit reached the same conclusion in a case essentially identical to *Parker*. In *CNA*, a CNA employee was covered under a long term disability plan which, like the plan in *Parker*, limited

benefits for mental and nervous disorders to two years. The employee became totally disabled due to severe depression and began receiving LTD benefits. Claiming that the difference in the length of time disability benefits were payable to individuals with physical disorders as opposed to those with mental disorders violated the ADA, the employee filed a complaint with the EEOC, and the EEOC sued to enjoin CNA from terminating her LTD benefits. After the district court granted CNA's motion for summary judgment,[11] the Seventh Circuit affirmed, holding that the totally disabled employee was not "qualified individual with a disability" and therefore could not state a claim under Title I.2 96 F.3d at 143, 1045. The court rejected the EEOC'c "strained" interpretation that the employee's "employment position" was "disability benefits recipient," because "[a]n 'employment position' is a job." 96 F.3d at 1044.

In *Gonzales v. Garner Food Services*, 89 F.3d 1523 (11th Cir. 1996), *cert. denied*, 65 USLW 3766 (May 19, 1997), the Eleventh Circuit similarly rejected the "qualified benefit recipient" theory, specifically rebuffing the EEOC's attempt to "shoehorn" a totally disabled individual into the statutory definition. 89 F.3d at 1529.

Similarly, in *Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768 (8th Cir. 1987), *cert. denied*, 485 U.S. 938 (1988), the Eighth Circuit hald that a totally disabled employee was not an "otherwise qualified handicapped individual" and thus could not state a claim under the Rehabilitation Act for discrimination in the provision of

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[11] The district court held, *inter alia*: "Because it is undisputed that [the employee] is a totally disabled individual who can no longer perform any job for which she is qualified, [she] does not meet the definition of a 'qualified individual with a disability.' The court, therefore, holds that [she] does not have standing to bring a claim under Title I of the ADA." *EEOC v. CNA Ins. Cos.*, 95 C 5835, 5 A.D. Cases 1763, 1996 WL 26879 *5 (January 23, 1996 N.D. Ill.).

fringe benefits. The Eighth Circuit found that the Rehabilitation Act was intended to prohibit discrimination only against an employee who is able to perform his job. The court concluded:

> [B]oth the language of the statute and its interpretation by the Supreme Court [in *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979)] indicate that section 504 was designed to prohibit discrimination within the ambit of the employment relationship in which the employee is potentially able to do the job in question. Though it may seem undesirable to discriminate against a handicapped employee who is no longer able to do his or her job, *this sort of discrimination is simply not within the protection of § 504.*

831 F.2d at 771 (emphasis added). Therefore, the court denied the employee's claim with respect to fringe benefits, because, by her own admission, she was unable to perform her job. *Id.* at 771.

Petitioner's attempt to distinguish *Beauford* is unavailing. *See* Petition, pp. 21-22. That the Rehabilitation Act lacks the insurance "safe harbor" provision in the ADA has nothing whatsoever to do with the court's application of that statute's "otherwise qualified handicapped individual" requirement.

Petitioner argues that the language of Title I must be viewed expansively "in the context of the ADA's broader meaning and purpose" to improve the lot of disabled individuals. Petition, pp. 24-25. However, the duty of the judiciary is to apply the statute as written by Congress. Under statutory construction principles, the rule is firmly esablished that "the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue, judicial inquiry into the statute meaning . . . is finished." *Cowart v. Niklos Drilling Co.*, 505

U.S. 469, 475 (1992) (citation omitted). Accordingly, "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration." *Mertens v. Hewitt Associates,* 508 U.S. 248, 261 (1993) (citation omitted). As the appellate panel in *Parker* remarked, it is not for the courts to alter or enhance the plain meaning of Congressional enactments. If, as Petitioner believes, Congress left a gap in the ADA's coverage relative to her particular situation, it is for Congress, not the courts, to mend that gap. *See* App., p. 51.

Moreover, the evidence indicates that Congress's limitation of Title I protection to persons who can work was purposeful. Congress could have drafted a broader definition of a "qualified individual with a disability" as it did in Title II of the ADA. In contrast to the Title I definition, in Title II Congress defined "qualified individual with a disability" as:

> an individual with a disability who, with or without reasonable modification to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2). Clearly, Congress knew how to define "qualified individual with a disability" more broadly when it chose to do so. Unquestionably, it did not do so in Title I, but rather chose to limit the protection afforded under Title I to disabled individuals who can work.

Since the circuit courts are in agreement with *Parker's* Title I holding, there is no compelling reason to grant discretionary review. The Court should wait until an actual circuit conflict presents itself, if ever, before considering review of this issue. Presently, at least one case involving the same Title I issue is at the appellate level: *Ford v. Schering-Plough Corp., et al.*, No. 96-5674 (3rd Cir.) which has been fully briefed and is awaiting oral argument. Several district court cases involving the same

Title I issue are currently pending: *Leonard F. v. Israel Discount Bank*, 95 CIV 6964 (CLB) (S.D. N.Y.); *Lewis v. Aetna Life Ins. Co.*, No. CIV A.97-1230-A (E.D. Va.); *EEOC v. Chase Bank*, No. 97 CIV 6620 (S.D. N.Y.); and *EEOC v. Staten Island Savings Bank*, No. CV 97-5142 (E.D. N.Y.). When, and if, appellate decisions in these or other cases result in a conflict with *Parker*, then consideration of review by this Court may be appropriate.

### B. *Because the Civil Rights Act Title VII Holding in* Robinson *Is Inapplicable to the ADA Title I Holding in* Parker, *Petitioner's Request for Review Should Be Denied.*

This Court should also reject Petitioner's argument that the Sixth Circuit's ADA Title I holding in *Parker* is inconsistent with this Court's holding in *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997), that former employees are protected against retaliatory discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* In *Robinson*, the Court found that the term "employee" in § 704(a), 42 U.S.C. § 2000e-3(a), was ambiguous, and therefore concluded that, consistent with the broader context of Title VII, former employees are protected from retaliation for filing a discrimination complaint. 117 S. Ct. at 848.

The Court's decision in *Robinson*, however, has no relevance to the ADA Title I holding in *Parker* that Petitioner was not a "qualified individual with a disability." Whether Petitioner was a former employee is irrelevant to the *Parker* holding. Unlike Title VII of the Civil Rights Act, Title I of the ADA contains a threshold requirement that a plaintiff be "qualified," i.e., able to perform the essential functions of the job. 42 U.S.C. § 12111(8); § 12112. Absent such a showing, there is no ADA protection. Because the statutory language here is not ambiguous (*see* cases so holding, *supra* at pp. 20-22), there is no need for further inquiry.

Furthermore, in *Robinson* the Court placed considerable emphasis on the fact that Title VII's definition of employee lacked "any temporal qualifier and is consistent with either current or past employment." 117 S. Ct. at 846. In contrast, Title I of the ADA does contain a significant temporal qualifier: a "qualified individual with a disability" must be able to perform the "essential functions of the employment position that such individual *holds or desires.*" 42 U.S.C. § 12111(8) (emphasis added). One only "holds" a job in the present or "desires" a position for the future; neither word can be used to refer to the past. Thus, having been able at some time in the past to perform the essential functions of a job is plainly not sufficient to qualify for protection under Title I.

The precise argument made by Petitioner was rejected by the Seventh Circuit in *EEOC v. CNA*. There, in a circuit that already recognized protection for former employees under Title VII's retaliation provision, the EEOC sought to bootstrap such protection to create standing for a totally disabled former employee under Title I of the ADA. Rejecting the agency's argument, the Seventh Circuit concluded that the status of the complainant as a former employee did not confer ADA protection. 96 F.3d at 1044-45.

Therefore, because *Robinson* is inapplicable to the *Parker* holding, there is no reason to grant discretionary review.

### III. Because The Meaning And Application Of Section 501(c) Of The ADA Was Not Addressed By The En Banc Sixth Circuit In *Parker*, There Is No Compelling Reason For Granting Discretionary Review.

The Court should reject Petitioner's assertion that the meaning of the ADA's "safe harbor" provision, Section 501(c), 42 U.S.C. § 12201(c), is ripe for review. *See* Petition, p. i. Decidedly it is not, since the *Parker* court expressly did not reach the issue of interpretation of Section 501(c). The Sixth Circuit remarked:

> We leave the resolution of the proper definition of subterfuge in Title IV for another day because we conclude that a long-term disability plan provided by an employer is not covered by Title III; the safe harbor provision is, therefore, not implicated.

App., pp. 16-17, fn. 7.

Similarly, the First Circuit in *Carparts* did not decide whether or how to apply Section 501(c). In *dicta*, the First Circuit speculated about the application of Section 501(c) to insurance,[12] noting:

> [T]here is some indication in the legislative history that the [insurance] industry received this exemption not because its policies would otherwise be substantively regulated under Title III, but because "there is some uncertainty over the possible interpretations of the language contained in Titles I, II and III as it applies to insurance . . . ." *See* S. Rep. No. 116, 101 Cong., 1st Sess. at 84 (1989).

Thus, because the issue of the meaning and application of Section 501(c) was not decided in *Parker*, it is not ripe for review and the Petition should therefore be denied.

## CONCLUSION

Because the questions Petitioner raises do not present a compelling reason for review, the Petition should be denied.

Respectfully submitted,

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December 16, 1997

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[12] Notably, there was no insurance policy at issue in *Carparts*: the benefits plan was self-funded. 37 F.3d at 14.

# APPENDIX

# APPENDIX

## APPENDIX

### RULE 29.6 STATEMENT

Respondent Metropolitan Life Insurance Company has no parent company, but has the following affiliates and subsidiaries, other than wholly-owned subsidiaries:

AEW Advisors, Inc.
AEW Capital Management, Inc.
AEW Capital Management, L.P.
AEW Hotel Investment Corporation
AEW Hotel Investment Limited Partnership
AEW Investment Group, Inc.
AEW Real Estate Advisors, Inc.
AEW Real Estate Advisors, Limited Partnership
AEW Securities, L.P.
Afore Genesis S.A. de C.V.
Aldrich Eastmen Global Investment Strategies, LLC.
Aurora Limited Partnership
Back Bay Advisors, Inc.
Back Bay Advisors, L.P.
BBC Investment Advisors, Inc.
BBC Investment Advisors, L.P.
BCOP Associates, L.P.
Blodgett Holdings, Inc.
Briggs Holdings, Inc.
Briggs Plumbing Products, Inc.
Capital Growth Management Limited Partnership
Chart House Enterprises, Inc.
Cloverleaf Properties, Inc.
Coating Technologies International, Inc.
Copley Management Advisors, L.P.
Copley Properties Company, Inc.
Copley Properties Company II, Inc.
Copley Pro perties Company III, Inc.
Copley Public Partners Holding, L.P.
Copley Securities Corporation
Copley/Orchard Investors, Inc.

Copley/Orchard Investors, L.P.
CREA Investors/Santa Fe Springs, Inc.
CREA Western Investors I, Inc.
CREA Western Investors I, L.P.
CTR Corp.
Dan River, Inc.
Eclipse Claim Services, Inc.
Eighth Copley Corp.
Fifth Copley Corp.
Fifth Singleton Corp.
First Income Corp.
Fourth Copley Corp.
Fourth Income Corp.
Fourth Singleton Corp.
Frialator International, Limited
Genesis Seguros Generales, Sociedad Anonima de Seguros y Reaseguros
Graystone Partners, Inc.
Graystone Partners, L.P.
GS Blodgett Corporation
GS Blodgett International, Ltd.
HACO Corp.
Harris Associates, Inc.
Harris Associates, L.P.
Harris Associates Securities, L.P.
Harris Partners, Inc.
Harris Partners, L.L.C.
Interbroker, Correduria de Reaseguros, S.A.
Jurika & Voyles, Inc.
Jurika & Voyles, L.P.
Kolon-Met Life Insurance Company
Lone Star Industries, Inc.
Loomis, Sayles & Company, Inc.
Loomis, Sayles & Company, L.P.
Luther's Bar-B-Q', Inc.
Magikitch'n, Inc.
MC Management, Inc.
MC Management, L.P.

Mecca Software, L.L.C.
Mercadian Capital, L.P.
Mercadian Funding, L.P.
Met Life International Real Estate Equity Shares, Inc.
Metric Colorado, Inc.
Metric Institutional Apartment Fund II, L.P.
Metropolitan Lloyds Insurance Company of Texas
Metropolitan Structures
Morguard Investments Limited
Nailite International, Inc.
NEF Corporation
NEIC Holdings, Inc.
New England Funds, L.P.
New England Funds Management, L.P.
New England Investment Associates, Inc.
New England Investment Companies, L.P.
Origenes AFJP S.A.
Perseus Partners, L.P.
Pesco Plus, L.C.
Pitco Frialator, Inc.
Pleiades Partners, L.P.
Public Employees Equities Services Company
R&T Asset Management, Inc.
Reich & Tang Asset Management, Inc.
Reich & Tang Asset Management, L.P.
Reich & Tang Distributors, L.P.
Reich & Tang Services, L.P.
Santander, Met, S.A.
Second Income Corp.
Seventh Copley Corp.
Sixth Copley Corp.
Sixth Singleton Corp.
Seguros Genesis, S.A. (Mexico)
Seguros Genesis, S.A. (Spain
SPA Partners, L.P.
State Street Research Intermediate Bond Fund
State Street Research International Fixed Income Fund
State Street Research Strategic Portfolios: Aggressive

State Street Research Strategic Portfolios: Conservative
State Street Research Strategic Portfolios: Moderate
Stellar Partners, L.P.
Third Income Corporation
Third Singleton Corporation
Vaughn, Nelson, Scarborough & McConnell, L.P.
VNSM, Inc.
West peak Investment Advisors, Inc.
West peak Investment Advisors, L.P.
Chart House Enterprises, Inc.
Lone Star Industries, Inc.
New England Investment Companies, L.P.